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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RICKY EARL O'RISE, Defendant and Appellant.	B184108 (Los Angeles County Super. Ct. No. MA030301)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol Koppel, Judge. (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part and remanded.

Susan Cardine, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte and Dawn S. Mortazavi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Ricky Earl O'Rise challenges his convictions of failing to disclose the origin of a recording or audio-visual work and counterfeiting a registered mark on the grounds the trial court erred by imposing an upper term without submitting the factual basis for the term to the jury. He also contends the sentence on count 2 reflected in the minute order and abstract of judgment is improper, as the trial court did not sentence him on count 2. We conclude the court did not err by imposing an upper term, but it erred by failing to pronounce sentence on count 2.

BACKGROUND AND PROCEDURAL HISTORY

Sheriff's deputies observed appellant holding a number of DVDs while standing near the open trunk of a parked vehicle and speaking to another man. As the deputies' patrol car approached, appellant placed the DVDs in the car and walked toward a nearby shop. They detained appellant, who admitted selling pirated DVDs.

In bifurcated proceedings, a jury convicted appellant of failing to disclose the origin of a recording or audio-visual work and counterfeiting a registered mark. The jury also found appellant had suffered a prior serious or violent felony conviction and served one prior prison term. Appellant was sentenced to a second strike term of 11 years in prison.

DISCUSSION

1. The trial court did not err by imposing an upper term.

Citing *Blakely v. Washington* (2004) 542 U.S. 296, appellant contends the imposition of the upper term for count 1 violated due process, in that it was based upon facts found by the court, not a jury. Appellant's contention has no merit, as *Blakely* does not apply to the imposition of upper terms. (*People v. Black* (2005) 35 Cal.4th 1238, 1261.)

2. The trial court erred by failing to pronounce sentence for count 2.

At the sentencing hearing, the trial court imposed an 11-year sentence for count 1, but made no mention of count 2. The minute order and abstract of judgment, however, indicate a seven-year sentence for count 2, stayed under Penal Code section 654. Appellant therefore asks this court to strike from the minute order and abstract all references to a sentence for count 2. He argues the failure to pronounce sentence for count 2 should be viewed as an act of leniency, and asks that we not remand for resentencing.

Because appellant was convicted on count 2, the trial court was required to pronounce sentence with regard to count 2, and was required to do so orally and in appellant's presence. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 13; Pen. Code, § 1193.) The minute order and abstract of judgment are documents prepared by the clerk. They cannot add to or modify the judgment. (*People v. Mesa*, *supra*, 14 Cal.3d at p. 471.) The purported sentence on count 2 set forth in the minute order and abstract are invalid.

Appellant's request to do no more than strike the references to a sentence upon count 2 would result in an unauthorized sentence, in that there would be no disposition with respect to count 2. It would be tantamount to a dismissing count 2, which we lack the power to do. (*People v. Morrow* (1969) 275 Cal.App.2d 507, 516.) Appellant's claim in his reply brief that he would be prejudiced by a remand for resentencing because it would "put[] another conviction on [his] criminal history" and potentially affect his prison classification deserves no consideration. Appellant already stands convicted on count 2, and his criminal history and prison classification should reflect that conviction. He is not entitled to benefit from the trial court's error in failing to pronounce sentence on that count.

"Correcting" the judgment in accordance with the intent expressed by the trial court before the jury reached a verdict on the enhancement allegations would be equally improper. Although Penal Code section 654 appears to require a stay of any sentence on

count 2, and remand may be an inefficient use of limited public resources, the power to sentence and discretion in selecting a sentence are vested solely in the trial court. We simply cannot step into the position of the trial court and impose a sentence where that court failed to do so. Accordingly, we must remand for sentencing on count 2.

DISPOSITION

The judgment is reversed and the cause remanded for sentencing on count 2. In all other respects, the judgment is affirmed.

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BOLAND, J.

We concur:

COOPER, P. J.

FLIER, J.